SUPREME COURT, U. S.
FEB 28 1967
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IN THE SUPREME COURT OF THE UNITED STATES

-------- Term, 1967

No. 1104

E. G. SWINDLEHURST,
Petitioner,

vs.

AMERICAN FIDELITY FIRE INSURANCE COMPANY,
a foreign insurance company; and
HENRY SALES, d/b/a Sales Welding,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT

E. G. Swindlehurst, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals, Division 2, dated February 22, 1966, and of the Supreme Court of the State of Michigan entered in the above entitled case on July 11, 1966 and on November 7, 1966.

Petitioner submits herewith his jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Michigan is reported in *2 Michigan Appeals 329* and is printed in Appendix "A" hereto, infra, pages 2a-6a The judgment of the Supreme Court of the State of Michigan is printed in Appendix "A", infra, page 6a. The judgments of the Circuit Court for the County of Ingham, Michigan is printed in Appendix "A" hereto, infra, pages 1a-2a and 8a-10a.

JURISDICTION

(a) (1) The nature of this procedure is a review of the decision alleged to violate ARTICLE VII Amendment of the Constitution to the United States by deciding questions of fact after they have been submitted to a jury that made a finding thereon and doing so, contrary to the common law as interpreted by the Supreme Court of the United States.

(2) Diversity of citizenship.

(3) Departure from the accepted course of judicial proceedings on the part of the Michigan Court of Appeals, Division 2, and the Michigan Supreme Court by reason of bias in favor of defendant insurance company and prejudice against the petitioner that requires invoking the power of supervision of the United States Supreme Court.

(b) The date of the judgment sought to be reviewed is July 11, 1966. The date of entry was August 5, 1966. Rehearing was denied November 7, 1966. The filing date of the appellate action was October 27, 1964. The time to file this application was extended from February 6, 1967 to and including March 6, 1967 on February 9, 1967.

(c) The statutory provision conferring jurisdiction on appeal is Court Rule 19 (1) (a). The jurisdiction of this Court is invoked under 28 USC § 1275.

The Special and Important Reasons are:

(1) Jury tried facts were re-examined by the Court on Appeal and the jury's findings rejected.

(2) The Court on appeal did not follow the interpretation of the common law on res judicata made by the Supreme Court of the United States which is the law of the land.

(3) The Federal question is the right to a jury trial as guaranteed by the SEVENTH Amendment to the United States Constitution; it is of substance since the jury verdict of $56,000.00 is involved and the denial of this right was decided in a way not in accord with applicable decisions of the Supreme Court of the United States.

(4) There is diversity of citizenship; the defendant insurance company is a New York corporation and the plaintiff is a resident of the State of Michigan.

(5) There is bias in favor of the defendant insurance company. This is shown by the Court's use of decisive portions of cross-defendant's appellate brief as their opinion while ignoring the Trial Court's decision, and the review thereof, that occurred eight years before by the Michigan Supreme Court on the subject of res judicata — see ANNEX, pages 13-14. In addition the Court of Appeal's assessment of costs against petitioner in the amount of $1,774.85 supports the claim of bias by the Court of Appeals.

Prejudice against the plaintiff appears to exist by reason of his name, the first half and accented portion of which is "Swindle" and this appears to have influenced the Court in their decision that deprived petitioner of his right to the jury verdict without proper legal basis. The effect of this is to deny plaintiff the benefit of the jury's decision, if not for one reason then another. All reasons, however, are based on evidence presented and considered by the jury. This began with the Trial Court reducing the verdict,

continued by the Appellate Court in dismissing his case of conversion by reason of res judicata and, further, continued by the Supreme Court of Michigan rejecting the conversion reason but sustaining the results for other reasons, indicated as being the sale of the vehicles by the repairman under the Garagekeeper's Lien Law. This latter reason was the subject of voluminous instructions by the Trial Court and the verdict clearly shows the rejection as a question of fact.

(6) The Trial Court also invaded the province of the jury by weighing the amount of evidence and taking 21 months to act on a motion contrary to Court Rule that provided 20 days therefor.

(7) This issue has an effect on more than the parties involved, namely, all insured motorists in the United States.

(d) The cases sustaining the jurisdiction are:

Russell v. Place, 94 US 606, 608; 24 ed 214 (1876):

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the fact of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, — as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, — the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

Lowlor v. National Screen Service, 349 US 322, 326 (June 6, 1955). This case applied the res judicata interpretation found in *Russell v. Place, supra*, and distinguishes between res judicata and collateral estoppel, particularly in regard to continuing the same course of wrongful conduct and its effect on a subsequent cause of action between the same parties.

Basista v. Weir, 340 F 2d 74, 82 (Jan. 18, 1965). This is a civil rights case that applied the holding in res judicata interpretation found in *Russell v. Place, supra*, and *Lowlor v. National Screen Service, supra*.

Dick v. New York Life Insurance Co., 359 US 437. This case involved the propriety of the lower Court, depriving the plaintiff of the right to a jury decision. Certiorari was granted because of the importance of preserving for litigants their right to a jury trial.

QUESTIONS PRESENTED

(1) The question presented is whether a Court may reexamine a fact tried by a jury other than according to the rules of common law as interpreted by the Supreme Court of the United States.

(2) The question presented is whether a State Court may interpret the common law involving res judicata contrary to the interpretation given by the Supreme Court of the United States.

(3) When there is evidence sufficient to support a jury verdict for the plaintiff, may a State Court set aside the jury verdict and deprive the plaintiff of the right to a jury decision.

CONSTITUTIONAL PROVISIONS

ARTICLE VII, Amendments of the United States Constitution entitled, "Trial by Jury in Civil Cases":

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by

jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

ARTICLE II, Section 13 of the Constitution of 1908, State of Michigan, titled "Jury Trial":

"The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law."

ARTICLE I, Section 14, Constitution of 1963, State of Michigan, entitled "Jury Trials":

"The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree."

STATEMENT OF THE CASE

(a) The first instance of raising the Federal questions was on appeal to the Supreme Court of the State of Michigan. Prior to this time there had been no issue of a Federal question because the action of re-examining the facts tried by the jury or ruling contrary to the Supreme Court of the United States on the common law regarding res judicata had not occurred. It first appeared in the decision of the Court of Appeals.

(b) The method of raising the questions was an application for leave to appeal to the Supreme Court for the State of Michigan. This was done by the following application:

"The decision is in conflict with decision of the Supreme Court of Michigan and the Supreme Court of the United States.

"It violated the principle of law that a reviewing Court will not disturb the findings of the Trial Court

or jury as trier of the facts on the failure to establish an estoppel. There was a failure to recognize the distinction between the doctrine of collateral estoppel by judgment and res judicata, and citing the common law interpretation of res judicata set forth in *Russell v. Place, supra.*"

(c) The Supreme Court for the State of Michigan passed on the question by sustaining the Court of Appeals, as follows:

"* * * for the reason that while this Court does not concur in the reasoning by which the Court of Appeals reached its conclusion, nonetheless the Court is persuaded that the result reached by the Court of Appeals is correct."

The Court of Appeals had held "that Case No. 18,020, a contract action in which a judgment for defendant was rendered of no cause for action based on res judicata because of a prior contract case, was res judicata as to American Fidelity Fire Insurance Company in the instant matter (conversion-tort). The issues decided adversely to plaintiff in Case No. 18,020 (contract) are the same issues involved in the instant case (conversion)."

"The record shows that plaintiff failed to introduce material evidence that defendant Sales did not comply with the Garagekeepers Lien law (an affirmative defense of defendant Sales). Plaintiff, therefore, did not establish a prima facie case of conversion."

(d) Pertinent fact quotations are as follows:

(1) Plaintiff herein, E. G. Swindlehurst, instituted suit on September 23, 1957 alleging conversion of a tractor and trailer; the dates of these conversions were unknown. The plaintiff further alleged that the defendant had taken the vehicles for repair under the collision coverage of a contract of insurance; they had been damaged in an accident that occurred on September 5, 1950; the vehicles had not been returned to him.

(2) Discovery proceedings revealed that the tractor had been sold on November 9, 1954 by the defendant's district agent, Amos Nordman, to a Charles Rowan of Grand Rapids, Michigan; that the trailer had been sold on April 25, 1957 by the defendant Henry Sales who was the repairman designated by the defendant American Fidelity Fire Insurance Company.

(3) The defendant, American Fidelity Fire Insurance Company, filed a motion to dismiss on the grounds of res judicata, et al, on October 14, 1957, and defendant Henry Sales filed a like motion on October 24, 1957; therein were set forth the Ingham County, Michigan causes, No. 15,922 filed in 1951 and No. 18,020 filed in 1956, both being actions by the plaintiff on the contract of insurance and both being dismissed by the Court, the first being a directed verdict because of failure of the proper kind of damage proofs and the second, No. 18,020 on the grounds of res judicata referring back to the 1951 action, No. 15,922, Ingham County Circuit Court, State of Michigan.

(4) The Trial Court rendered an opinion denying the defendants' motions to dismiss on May 1, 1958. This opinion held that prior actions were based on contract and that the plaintiff had not had the choice of remedies at the time of the prior suits and that there had not been a prior determination of the conversion issue that was framed in the instant suit.

(5) The defendant, American Fidelity Fire Insurance Company, instituted an application for writ of certiorari on the Trial Court's decision to the Michigan Supreme Court. This was denied on July 24, 1958.

(6) The case was tried before a jury beginning on November 26, 1962. The basic facts were not in dispute; in excess of fifty exhibits were accepted in evidence by stipulation. The Court files of the previous cases, No. 15,922 and No. 18,020 were marked as exhibits and introduced in evidence by the defendants for jury consideration. The effect of these cases

was argued to the jury as a basis for a no cause of action verdict by the jury. The instruments pertaining to the defendant's repairman's alleged sale in which he was supposed to have secured title of the trailer for approximately $600.00 and the resale of the trailer for approximately $600.00 and the resale of the trailer for approximately $1,600.00 were put in evidence; the instruments involved in the transfer of the tractor were also received in evidence and showed similar treatment of plaintiff's vehicles. The Court instructed the jury they were the sole judge of the facts and their verdict should be based thereon. The verdict on December 4, 1962 was for $14,000.00 against the defendants jointly, and $42,000.00 against the defendant, American Fidelity Fire Insurance Company.

(7) The defendants filed motions for a new trial on December 19, 1962. In July, 1963 the defendants were permitted to amend their motion to include a motion to dismiss on the ground of res judicata and operation under the Michigan Garageman's Lien Law.

(8) The trial Court rendered an opinion granting a new trial on August 31, 1964 unless the plaintiff remitted $10,000.00 of the joint verdict and $38,000.00 of the verdict against American Fidelity Fire Insurance Company. The Court indicated "The testimony relative to whether or not the defendants did a wrongful act wilfully, wantonly or maliciously was not strong" in regard to plaintiff's claim for exemplary or punitive damages.

(9) On September 15, 1964, the plaintiff filed an appeal to the Michigan Supreme Court on the question of the Trial Court's remittitur. This action appeared to be on the Court's initiative and was taken later than 20 days after entry of judgment contrary to Michigan Court Rule 527.4. The defendants filed a cross-appeal alleging, among other things, that their motions to dismiss should have been granted on the grounds of res judicata.

(10) On February 22, 1966, the Court of Appeals, Division 2, to whom the appeal had been referred by the Michigan Supreme Court in January, 1965, rendered an opinion sustaining the defendant, American Fidelity Fire Insurance Company's defense of res judicata, and defendant Henry Sales' defense of proceeding under the Michigan Garagekeeper's Lien Law.

(11) On April 29, 1966, Division 2 of the Michigan Court of Appeals denied plaintiff's application for rehearing.

(12) The Michigan Supreme Court's decision on July 11, 1966 sustained the Court of Appeals as to the result reached while not concurring in the reasoning. This is understood to mean the grounds of res judicata was rejected but the sales under the Garagemen's Lien statute by the repairman were a proper basis for terminating plaintiff's cause of action. On re-consideration the Michigan Supreme Court, although plaintiff pointed out the erroneous facts relied on including, of course, the factual evidence presented to the jury, found it had not been made to appear that their prior order was erroneous.

Of special interest in considering the decision of the Court of Appeals and the review thereof of the Supreme Court of the State of Michigan is the fact that the defendants, American Fidelity Fire Insurance Company and Henry Sales, introduced the Court files of prior litigation between the parties at the trial of this cause, had them marked as exhibits and made available to the jury for consideration and as support of their arguments that the plaintiff had no cause for action in the conversion case under consideration. The jury verdict, infra shows this defense was rejected by the jury. This fact, considered in connection with the Michigan Supreme Court's decision on July 24, 1958 in refusing to review the Trial Court's decision on the subject of res judicata rendered April 28, 1958, should have foreclosed any further consideration of this matter. The cases so introduced in evidence were:

File No. 15,922 (1951) Ingham County, Michigan —

This case had been brought by the plaintiff for damages growing out of the defendant American Fidelity Fire Insurance Company's breach of contract and was based on the contract of insurance between the parties. At the close of plaintiff's proofs, in a jury trial, the Trial Court directed the jury to bring in a verdict of no cause for action for the reason that plaintiff had failed to show damages recoverable in a contract action (cost of repairs).

File No. 3754 (1953) Berrien County, Michigan —

This was an action by Henry Sales, one of the defendants in this cause, for the repair bill and storage of the plaintiff's trailer (the plaintiff here was named defendant there) and the Trial Court ordered E. G. Swindlehurst dismissed as a party because there was no privity of contract between Henry Sales and E. G. Swindlehurst. Henry Sales prevailed and secured judgment in the amount of approximately $2,000.00 against American Fidelity Fire Insurance Company, the other defendant here.

File No. 18,020, (1956), Ingham County, Michigan —

This was another action by the plaintiff on the contract of insurance and was brought after the law suits by the repairman indicated above and another repairman who had not been paid by defendant insurance company for his repair work on the tractor was disposed of. In this case the plaintiff was not permitted to put in his proofs. This action was interrupted by a motion to dismiss by the defendant American Fidelity Fire Insurance Company that was granted by the Court on the grounds of res judicata referring back to the 1951 Ingham County, Michigan action.

It is notable that these matters were all reviewed by the Trial Court before the trial and his decision was reviewed

by a writ of certiorari to the Michigan Supreme Court, the latter action being taken on July 24, 1958.

REASONS FOR GRANTING THE WRIT

The principal reason for granting the writ is that the appellant was denied the right to a jury decision by action of the State Court, that violated the SEVENTH AMENDMENT to the Constitution of the United States. The great damage that can occur to the rights of a person when the Trial or Appellate Court reviews the facts and takes over the function of the jury are clearly shown by this case.

As a further special and important reason for the issuance of a writ of certiorari, it is submitted that the present status of the law, as made by this case regarding insured owners of motor vehicles, is such that an insurance carrier can require the motor vehicle owner to deliver the damaged vehicle and if re-delivery is not made in accordance with the contract, there is no recourse for the motor vehicle owner. The insurer can neglect to repair, secure dismissal of law suits on the insurance contract, raise a seemingly endless list of technicalities and if the insured is fortunate enough to get his case to a jury, can have the jury's verdict swept away by further technicalities. The attempt to secure re-delivery of the motor vehicle, or recover its value, will not only fail but for making the attempt to so recover the vehicle and the loss of income during the time it was retained by the insurer, the obligation to pay court costs in the amount of $2,061.58 can be incurred. This happened to the plaintiff in this cause. While this may be deemed an isolated case, it is now legal precedent for this happening to an excess of 60,000,000 motor vehicle owners in the United States today.

CONCLUSION

Appellant submits that this appeal brings before the Court a substantial Federal question which requires plenary consideration, with briefs on the merits and oral arguments, for their resolution.

Respectfully submitted,

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ANNEX

EXTRACTS FROM DEFENDANT'S BRIEF ON CROSS-APPEAL of May 28, 1965 and EXTRACTS FROM MICHIGAN COURT OF APPEAL'S OPINION of February 22, 1966

(1) *Page 5 — Michigan Court of Appeal's Opinion:*

"Plaintiff had alternative remedies available to him, though he had but one cause of action. He could sue on the contracts of insurance for breach or he could pursue the tort remedy of conversion."

Page 28 — From Defendant's Brief:

"Plaintiff had alternative remedies available to him, though he had but one cause of action. He could sue on the contracts of insurance for breach, or he could pursue the tort remedy of conversion."

(2) *Pages 5-6 — Michigan Court of Appeal's Opinion:*

"Plaintiff having failed to make use of any remedy available to him after the adverse judgments in

previous cases, cannot avoid the consequences of failing to appeal by bringing a new suit clothed in a different form of action but based on the same cause of action."

Page 36 — From Defendant's Brief:

"Plaintiff, having failed to make use of the only remedy available to him after the adverse judgment in 18,020, cannot avoid the consequences of failing to appeal by bringing a new suit clothed in a different form of action but based on the same old cause of action."

(3) *Page 6 — Michigan Court of Appeal's Opinion:*

"The issue between the plaintiff and defendant AFFI Co. herein decided adversely to the plaintiff (Ingham County circuit court No. 18020) are the same issues involved in the instant suit."

Page 36 — From Defendant's Brief:

"These very issues were raised and decided adversely to plaintiff in 18,020. These same issues are, of necessity, involved in the instant suit."

(4) *Page 6 — Michigan Court of Appeal's Opinion:*

"The trial court in this matter erred in not granting defendant AFFI Co.'s motion to dismiss on the grounds of res judicata."

Page 38 — From Defendant's Brief:

"The trial court erred in not granting this defendant's motion for directed verdicts and for judgment notwithstanding the verdicts."

APPENDIX "A"

JUDGMENT

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

E. G. Swindlehurst,
Plaintiff,

vs.

File No. 18,884

American Fidelity Fire Insurance Co., a foreign insurance company, and Henry Sales, d/b/a Sales Welding,
Defendants.

At a session of said Court, held in the Court Room, City of Lansing on the 5th day of December, A.D., 1962.

Present: Hon. Sam Street Hughes, Circuit Judge.

The jury by whom the issue joined in this cause was tried having heretofore on December 4, 1962 rendered a verdict in favor of the plaintiff and against the defendants and having assessed plaintiff's damages, over and above his costs and charges by him about his suit in said behalf expended, at the sum of $42,000.00 against the defendant American Fidelity Fire Insurance Company and $14,000.00 against the defendant Henry Sales and American Fidelity Fire Insurance Company;

THEREFORE, IT IS ORDERED and ADJUDGED that the plaintiff take against the defendant American Fidelity Fire Insurance Company his damages as aforesaid in the sum of $42,000.00, together with costs and charges to be taxed, and have execution therefor; and further, that the plaintiff take against the defendant Henry Sales and the defendant American Fidelity Fire Insurance Company

as aforesaid in the sum of $14,000.00, together with costs and charges to be taxed, and have execution therefor.

Sam Street Hughes
Circuit Judge

OPINION OF THE MICHIGAN COURT OF APPEALS
(Filed February 22, 1966)
(Mich. App. No. 304)

BEFORE: McGREGOR, P.J., KAVANAGH and FITZGERALD, JJ.

McGREGOR, P. J. This is a suit for the alleged conversion of plaintiff's 1950 Ford tractor and trailer. In September, 1950, plaintiff E. G. Swindlehurst was the owner of a tractor and steel hauling trailer which were damaged in an accident. The equipment was insured with defendant American Fidelity Fire Insurance Company (hereinafter referred to as AFFI Co.) under separate policies of $250 deductible collision insurance. Both policies gave the AFFI Co. the option of repair. AFFI Co. took possession of the damaged equipment, placing the trailer with defendfendant Henry Sales and the tractor with C. C. Creed, Inc. (hereinafter referred to as Creed) for the necessary repairs. Swindlehurst considered the repair work done by Sales and Creed to be unsatisfactory and refused to pay the $250 deductible due each for their work under the terms of the insurance policies or to retake possession of the equipment. Negotiations between the parties did not lead to any solution and a long record of litigation precedes the instant case.

In July, 1951, Swindlehurst brought a suit for breach of contract against AFFI Co. in Ingham county circuit court (No. 15,922). At the conclusion of Swindlehurst's proofs, AFFI Co.'s motion for a directed verdict of no cause of action on the merits was granted by the court, based on a failure to present proof as to damages. Swindlehurst's motion for a new trial was denied and no appeal was taken.

Separate suits were brought by Sales (Berrien county No. 9754) and Creed (Berrien county No. 9935) for the

cost of repairs and storage charges, naming Swindlehurst and the AFFI Co. as defendants. A settlement was reached between Creed and the AFFI Co., and that suit was dismissed. The suit brought by Sales resulted in judgment on January 14, 1955, against AFFI Co., with the court finding that Sales "completed those repairs in a good, workmanlike manner", and further finding no cause of action as to Swindlehurst, based on the absence of privity of contract. On that day the plaintiff and the defendant Sales entered into an agreement that plaintiff would remove the trailer in 2 or 3 days without charge for storage, and that if plaintiff did not do so, there would be a charge for storage at the rate of $2 per day. Plaintiff Swindlehurst continued to refuse to take possession of the trailer and, about 9 months later, on October 19, 1955 (this being more than 5 years after defendant Sales received the trailer), defendant Sales, pursuant to the provisions of the garage-keeper's lien statute, (CL 1948, §570.301 et seq [Stat Ann 1960 Rev § 9.1711 et seq]), sold the trailer. The Ford tractor had been sold by Creed on April 12, 1954, pursuant to the provisions of the garage-keeper's lien statute, supra.

In April, 1956, Swindlehurst brought suit against AFFI Co. in Ingham county (Circuit Court No. 18020) demanding damages of $65,000.00 for breach of contract and loss of profits. After hearing part of the proofs the trial court ordered that a judgment of no cause of action be entered in favor of AFFI Co., holding that the issues had been previously adjudicated in the first suit tried before the Ingham county court and in an opinion, filed May 3, 1957, denying plaintiff's motion for a new trial, said:

> "The first case (Ingham County No. 15922) was based on what amounts to a conversion. The instant case is the same. If the plaintiff is right in the instant case, he should have appealed from the judgment entered in the former case.
>
> Motion for a new trial is denied."

The instant action for conversion was brought by Swindlehurst in September, 1957, naming AFFI Co., Sales and Creed as defendants. An order was entered in 1958,

dismissing Creed as a party defendant. Defendant Sales entered a plea of general denial; defendant AFFI Co. pleaded affirmative defenses of res judicata, split cause of action, election of remedies, and statute of limitations, and a plea of general denial. AFFI Co.'s motion to dismiss based on res judicata and the statute of limitations was denied by the Ingham county circuit court. The defendants' application for leave to appeal that decision was denied by the Supreme Court.

This case came to trail in November, 1962, and resulted in a jury verdict for Swindlehurst against AFFI Co. and Sales in the amount of $14,000 on the trailer, and for Swindlehurst against AFFI Co. alone in the amount of $42,000.00 on the tractor. Motions for a new trial were filed by both AFFI Co. and Sales on December 19, 1962, with subsequent motions to amend the original motions filed, authorized, and accepted by the trial court.

On August 31, 1964, twenty-one months after the motion for new trial was filed,* the trial court filed its opinion on the motions for a new trial, holding that the verdicts were execessive and that a new trial would be granted unless Swindlehurst filed a remittitur of $38,000 of the verdict against AFFI Co. on the tractor, leaving a judgment of $4,000; and a remittitur of $10,000 of the verdict against AFFI Co. and Sales on the trailer, leaving a judgment of $4,000. Swindlehurst thereafter filed his claim of appeal and AFFI Co. and Sales filed claims of cross-appeal.

The first question we consider is whether or not the trial court erred in denying a motion made by defendant, AFFI Co. for dismissal on the grounds of *res judicata*.

> "It is not intended that a controversy shall be tried over and over, but rather that one suit, in which issues are tried and disposed of on the merits, must conclude the litigation. If a party fails in making a full presentation of his case, whereby the judgment has passed against him, he cannot be permitted to make a better showing in a new suit." *Bank v. Billups* (1958), 351 Mich. 628, 635.

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* GCR 1963, 527.1(4).

In *Strech v. Blissfield Schools* (1959), 357 Mich. 620, 623, the Supreme Court said:

> "*Res judicata* applies not only to issues which were determined on their merits but also to matters which the parties had an opportunity to present for adjudication on the merits. *Porth v. Cadillac Motor Car Co.*, 209 Mich. 89; *Thompson v. Doore*, 269 Mich. 466; *McDaniel v. Black*, 270 Mich. 305; *Boyich v. J. A. Utley Co.*, 306 Mich. 625."

In *Machen v. Budd Wheel Co.*, (1933), 265 Mich. 530, 535, it is stated:

> "The doctrine of '*res judicata*' rests upon the principle that a question once determined by a court of competent jurisdiction by a judgment on the merits is forever settled so far as litigants and those in privity with them are concerned. * * *"

Also:

> "Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action." Restatement, Judgments, § 48 (p. 191).

Plaintiff had alternative remedies available to him, though he had but one cause of action. He could sue on the contracts of insurance for breach or he could pursue the tort remedy of conversion. (See *Newman v. Olney*, 118 Mich. 545). Ingham County case No. 18020, filed April 20, 1956, by the plaintiff against AFFI Co., in which a judgment for the defendant for no cause of action was entered, is res judicata to the defendant AFFI Co. in the instant matter. In Restatement, Judgments, § 49, (p. 193) it is stated:

> "A judgment for the defendant is not on the merits where it is based merely on rules of procedure rather than on rules of substantive law. If the judgment

determines that the plaintiff has no cause of action, it is on the merits . . ."

Plaintiff having failed to make use of any remedy available to him after the adverse judgments in previous cases, cannot avoid the consequences of failing to appeal by bringing a new suit clothed in a different form of action but based on the same cause of action. The issue between the plaintiff and defendant AFFI Co. herein decided adversely to the plaintiff (Ingham county circuit court No. 18020) are the same issues involved in the instant suit. The justiciable controversy in this case has heretofore been determined by a court of competent jurisdiction. The trial court in this matter erred in not granting defendant AFFI Co.'s motion to dismiss on the grounds of res judicata.

At the conclusion of the plaintiff's evidence, defendant Sales' counsel moved the court to direct a verdict of no cause of action. The record shows that plaintiff failed to introduce material evidence that the defendant Sales did not comply with the garage-keeper's lien law. Plaintiff therefore did not establish a prima facie case of conversion. Defendant Sales' motion for a directed verdict of no cause of action should have been granted. *Thoma v. Tracy Motor Sales* (1960), 360 Mich. 434. In view of the decision herein, the other issues raised by the parties are irrelevant.

As to both defendants, the American Fidelity Fire Insurance Company and Henry Sales, the judgment of the trial court is reversed and a judgment of no cause of action shall be entered, with costs to appellees.

JUDGMENT OF THE SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 11th day of July in the year of our Lord one thousand nine hundred and sixty-six.

Present the Honorable

Thomas M. Kavanagh,
Chief Justice,
John R. Dethmers,
Harry F. Kelly,
Eugene F. Black,
Theodore Souris,
Otis M. Smith,
Michael D. O'Hara,
Paul L. Adams,
Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, for the reason that while this Court does not concur with the reasoning by which the Count of Appeals reached its conclusion, nonetheless the Court is persuaded that the result reached by the Court of Appeals is correct.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 12th day of July in the year of our Lord one thousand nine hundred and sixty-six.

Donald F. Winters,
Clerk.

JUDGMENT

At a session of said Court, held in the Court Room in the City Hall, in the City of Lansing, Ingham County, Michigan, on this 5th day of August 1966.

Present: Hon. Sam Street Hughes, Circuit Judge.

In this cause it appearing from the pleadings on file herein that a motion to dismiss on the ground of res judicata having been filed by defendant American Fidelity Fire Insurance Company on October 14, 1957, and the said motion to dismiss thereafter having been brought on for hearing, and this Court having denied the said motion to dismiss by an order entered on May 1, 1958, and thereafter this cause having come on for jury trial commencing on November 13, 1962, and at the conclusion of the plaintiff's proofs a motion for directed verdict having been made by defendant American Fidelity Fire Insurance Company on the ground of res judicata, and a motion for a directed verdict also having been made by defendant Henry Sales, d/b/a Sales Welding, on the ground that plaintiff failed to establish a prima facie case of conversion against defendant Henry Sales, and this Court having denied the said motions for directed verdicts, and the said motions for directed verdicts having been renewed at the conclusion of all proofs and this Court again having denied the said motions for directed verdicts, and the cause thereafter having been submitted to the jury and the jury having returned a verdict in favor of plaintiff and against defendant American Fidelity Fire Insurance Company in the amount of $42,000.00 and a verdict in favor of plaintiff and against defendant American Fidelity Fire Insurance Company and defendant Henry Sales in the amount of $14,000.00, and a judgment on the said verdicts having been entered on December 5, 1962, and the respective defendants having filed motions for new trial and amendments to motions for new trial and for judgment notwithstanding the verdicts, and an order having been entered by this Court on September 9, 1964 denying the respective defendants' motions for judgment notwithstanding the verdicts but granting the defendants a new trial unless written remittiturs were filed by plaintiff, and the plaintiff having

failed to file written remittiturs and having appealed to the Michigan Supreme Court from this Court's order of September 9, 1964 granting defendants a new trial unless written remittiturs were filed, and the defendants having filed a cross-appeal to the Michigan Supreme Court from the verdicts and judgments rendered in this cause, from the orders of this Court denying the respective defendants' motions to dismiss, from this Court's refusal to grant the respective defendants' motions for directed verdicts of no cause for action, and from this Court's order of September 9, 1964 denying the respective defendants' motions for judgment notwithstanding the verdicts, and the said appeal and the said cross-appeal to the Michigan Supreme Court having been transferred to the Michigan Court of Appeals, and the said Court of Appeals having rendered its opinion in this cause on February 22, 1966, and it appearing from the said opinion that this Court erred in not granting defendant American Fidelity Fire Insurance Company's motion to dismiss, and it further appearing from the said opinion that this Court erred in not directing a verdict in favor of defendant Henry Sales, and the Court of Appeals by the said opinion of February 22, 1966 having reversed this Court and ordered the entry of a judgment of no cause for action as to both defendants with costs to the appellees, and the plaintiff having filed a petition for rehearing in the Court of Appeals, and the Court of Appeals having denied the petition for rehearing in an order dated April 29, 1966, and the plaintiff thereafter having filed an application for leave to appeal to the Michigan Supreme Court, and the Supreme Court in an order dated July 11, 1966 having denied the application for leave to appeal for the reason that the result reached by the Court of Appeals was correct, and it appearing proper to this Court that a judgment of no cause for action be entered as to both defendants with costs to be taxed in favor of the defendants in accordance with the directive of the Court of Appeals, and the Court being fully advised in the premises,

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by his suit against defendant American Fidelity Fire Insurance Company and

go hereof without day and that defendant American Fidelity Fire Insurance Company recover against plaintiff its costs and charges to be taxed and have execution therefor.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff take nothing by his suit against defendant Henry Sales and go hereof without day and that defendant Henry Sales recover against plaintiff his costs and charges to be taxed and have execution therefor.

Sam Street Hughes
Circuit Judge

Examined, Countersigned and
Entered by me:
Laura Wahl
Dep. Clerk

Attest: A True Copy
Inez Swaninger
Dep. Clerk

JUDGMENT OF THE SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 7th day of November in the year of our Lord one thousand nine hundred and sixty-six.

Present the Honorable

Thomas M. Kavanagh,
Chief Justice,
John R. Dethmers,
Harry F. Kelly,
Eugene F. Black,
Theodore Souris,
Otis M. Smith,
Michael D. O'Hara,
Paul L. Adams,
Associate Justices.

On order of the Court, the application to reconsider the order of this Court of July 11, 1966, denying leave to appeal is considered, and the same is DENIED, for the reason that it is not made to appear that said order was erroneous. The motion to dismiss the application is GRANTED. The request for the assessment of punitive damages is DENIED.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of November in the year of our Lord one thousand nine hundred and sixty-six.

Donald F. Winters,
Clerk.